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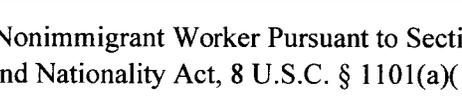
U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 219 52689 Office: NEBRASKA SERVICE CENTER Date: **AUG 02 2006**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

0.1.2006

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an information technology consulting company that seeks to employ the beneficiary as a production design engineer. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. Counsel submits a timely appeal.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) the Form I-290B and additional evidence. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a production design engineer. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail creating computer-aided designs for the manufacturing sector; identifying and implementing the right software, computer technology, and programs to ensure proper designs; using concepts of control charts, change and assignable causes of variations, construction, and interpretation of process capability and rational sub-grouping; incorporating knowledge of tools of reliable engineering; applying knowledge of mathematics and engineering statistics to reliability and maintainability problems such as formulating mathematical models for reliability allocation and redundancy, and time dependent and independent prediction measures for maintained and non-maintained systems. Counsel's response to the request for evidence elaborated on the proposed duties. For the proposed position the petitioner asserts that it requires a bachelor's degree or its equivalent in a related field.

In denying the petition, the director stated that the petitioner failed to submit evidence corroborating that it has sufficient work at the H-1B level at the time of filing to immediately employ the beneficiary at the work location shown in the certified labor condition application (LCA), which is Kalamazoo, Michigan. The director found the submitted Form ETA 9035 did not relate to the intended location of the beneficiary's employment, which the response to the request for evidence indicates is in New Jersey. Thus, the director stated that the petition may not be approved in accordance with 29 C.F.R. § 730(c).

On appeal, counsel submits, in addition to other evidence, a revised purchase work order and an LCA for the work location in Mount Laurel, New Jersey.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The record in this proceeding contains: (1) an LCA that the Department of Labor (DOL) certified on July 27, 2004 for the Kalamazoo, Missouri, work location; (2) the Form I-129 petition and supporting documentation that CIS received on July 29, 2004; (3) the director's request for additional evidence; (4) the petitioner's response to the director's request; (5) the director's denial letter; (6) the Form I-290B; (7) the LCA without the certification date for the Mount Laurel, New Jersey, work location; (8) contractual agreements, invoices, and pay stubs; (9) and counsel's February 8, 2005 letter. The AAO reviewed the record in its entirety before issuing its decision.

CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. Thus, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The record reflects that the petitioner's I-129 petition was received by CIS on July 29, 2004, and on appeal, the petitioner seeks to submit an LCA without a certification date. The LCA submitted on July 27, 2004 was for a worksite (Kalamazoo, Missouri) that is unrelated to the beneficiary's actual place of employment, which the submitted contract reveals is Mount Laurel, New Jersey. Because the petitioner seeks to submit on appeal an LCA that does not have a certification date for the Mount Laurel, New Jersey, worksite, the petitioner fails to comply with CIS regulations set forth at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). For this reason, the petition will be denied.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.